No. 83-1911

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IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

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58 pp

Questions Presented

1. Under the First Amendment, may a court permanently enjoin a publisher from publishing information and opinions about publicly traded securities on the ground that the publisher is not registered under the Investment Advisers Act of 1940?

2. Do the registration provisions of the Investment Advisers Act of 1940, permitting denial or revocation of registration on the ground of prior misconduct, constitute an unconstitutional prior restraint under the First Amendment on the rights of publishers to publish information and opinions about publicly traded securities?

3. Does the exemption in the Investment Advisers Act of 1940 for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" unconstitutionally discriminate under the First Amendment, or under the principles of equal protection of the laws incorporated in the due process clause of the Fifth Amendment, against publishers of non-exempt publications?

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BRIEF OF PETITIONERS

Opinions Below

The citations for the opinions of the courts below are *SEC* v. *Lowe,* 725 F.2d 892 (2d Cir. 1984) and *SEC* v. *Lowe,* 556 F. Supp. 1359 (E.D.N.Y. 1983). These opinions are reproduced in the appendix to the petition for certiorari at A1 and A41, respectively.

Ground Upon Which This Court's Jurisdiction Is Invoked

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the court of appeals was entered January 18, 1984, a timely petition for rehearing was denied by the court of appeals on February 22, 1984, and the petition for a writ of certiorari was filed in this Court on May 16, 1984. The petition was granted by this Court by order dated October 1, 1984.

Constitutional Provisions

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

The following sections of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* (the "Act"), are reproduced in the appendix to the petition for certiorari at A68: section 202(a)(11), 15 U.S.C. § 80b-2(a)(11) (defining "investment adviser"); section 203(a), 15 U.S.C. § 80b-3(a) (requiring registration); section 203(e), 15 U.S.C. § 80b-3(e) (specifying the procedure for registration); section 203(e), 15 U.S.C. § 80b-3(e) (providing for censure, denial, suspension or revocation of registration); section 203(f), 15 U.S.C. § 80b-3(f) (providing for sanctions against associates of investment advisers) and section 209(e), 15 U.S.C. § 80b-9(e) (providing for injunctions against violations).

As defined in section 202(a)(11), 15 U.S.C. § 80b-2(a)(11),

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly, or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; . . . .*

Section 203(a), 15 U.S.C. § 80b-3(a), makes it unlawful for any investment adviser, unless registered under section 203, to make use of the mails or any means or instrumen-

* The definition also contains exclusions from the definition for bankers, lawyers, accountants, brokers and others.

tality of interstate commerce in connection with his or its business as an investment adviser.*

Section 203(e), 15 U.S.C. § 80b-3(e), provides, *inter alia*, for suspension or revocation of a registration if the Commission finds that such action is in the public interest and that certain prior misconduct has occurred.

> The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that . . . [such action] is in the public interest . . .

and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated has engaged in specified misconduct, or is subject to certain types of injunctions or orders. *Id.* Each of these events or conditions is referred to as a "disqualification" in section 203(c)(1)(G), 15 U.S.C. § 80b-3(c)(1)(G).

The "disqualification[s]" include that the adviser or any person associated with the adviser, has been convicted within ten years preceding the filing of the application or at any time thereafter, of any of a broad range of felonies or misdemeanors. Section 203(e), 15 U.S.C. § 80b-3(e).**

* Exceptions provided for in Section 203(a) are not relevant. *See* section 203(b), 15 U.S.C. § 80b-3(b).

** The "disqualifications" also include that the adviser or associated person has willfully violated any provision of the federal securities laws "or is unable to comply with any such provision," or that he is subject to a permanent or temporary injunction against acting as an investment adviser or investment broker, dealer or municipal securities dealer. *Id.*

Denial of registration is provided for in section 203(d), 15 U.S.C. § 80b-3(d). That section states that "[t]he Commission shall deny such registration . . . if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section." The Commission's authority to order that a person not be associated with an investment adviser is provided in section 203(f), 15 U.S.C. § 80b-3(f). Section 209(e), 15 U.S.C. § 80b-9(e), provides the Commission with authority to obtain injunctive relief against violations of the Act. Section 217, 15 U.S.C. § 80b-17, provides criminal penalties, including up to 5 years imprisonment, for willful violation of any provision of the Act or any rule, regulation or order of the Commission thereunder.

Legislative History

As enacted in August 1940, the Act was title II of H.R. 10065, 76th Cong., 3d Sess., 54 Stat. 847 (1940). Title I of the bill was the Investment Company Act of 1940, 54 Stat. 789 (1940), codified at 15 U.S.C. §§ 80a-1 *et seq.* Enactment followed publication by the Commission of *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission (1939)*, (the *"Commission Report"*), a report made pursuant to section 30 of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 827 (1935).* One of the related supplemental reports issued by the Commission pertained to investment counsellors and advisers (the *"Supplemental Report"*).** Following publication of the *Commission Report* and the *Supplemental*

* 15 U.S.C. § 79z-4.

** *Investment Counsel, Investment Management, Investment Supervisory and Investment Advisory Services*, H.R. Doc. 477, 76th Cong., 2d Sess. (1939).

Report, companion bills to regulate investment trusts, investment companies and investment counsellors were introduced in the House and Senate in March 1940, and hearings were held before a subcommittee of the Senate Committee on Banking and Currency in April 1940 and before a subcommittee of the House Committee on Interstate and Foreign Commerce in June 1940.*

The *Commission Report*, the *Supplemental Report* and the legislative proceedings related primarily to investment trusts, investment companies and investment counsellors rendering personal advice to clients, and contained few references to publishers. The paucity of legislative history pertaining to publishers has previously been indicated by the Court. *See SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 187 n. 15 (1963). At one point, however, the *Supplemental Report* reflected concern with the exaggerated advertising of some organizations that apparently included publishers, and indicated that phrases used in their advertisements disclosed the " 'tipster' character of their services." *Supplemental Report*, p. 21. The *Supplemental Report* cited "advertisements which emphasized 'cheap stocks for large profits,' 'trading advice,' 'stocks at $2' and so forth. . . ." *Id.* *See also id.* at p. 27. Examples of these advertisements appeared in Appendix E to the *Supplemental Report*.

The House subcommittee report on H.R. 10065 described the purpose of the Act:

* *Hearings on Investment Trusts and Investment Companies, H.R. 10065, Subcommittee of the House Committee on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. (1940) and *Hearings on Investment Trusts and Investment Companies, S. 3580* [the Senate predecessor of H.R. 10065], *Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. (1940).

> The essential purpose of title II of the bill is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful. The title also recognizes the personalized character of the services of investment advisers and especial care has been taken in the drafting of the bill to respect this relationship between investment advisers and their clients.

H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940). Similar language appears in the earlier Senate Committee Report, S. Rep. No. 1775, 76th Cong., 3d Sess. 21-22 (1940).

As originally enacted, the Act provided that the Commission could revoke the registration of an investment adviser, in the public interest, on the ground of prior convictions involving the purchase or sale of any security or arising out of securities activities or the granting of an injunction against acting as a securities professional. 54 Stat. 847, 851 (1940). These original "disqualification[s]" are now contained in sections 203(e)(2)(B) and 203(e)(3), 15 U.S.C. 80b-3(e)(2)(B) and 15 U.S.C. 80b-3(e)(3). Amendments to the Act in 1960, 1970 and 1975* expanded the grounds for revocation and also provided for remedies alternative to revocation, such as suspension and censure. These changes were intended to strengthen disciplinary controls and to conform these remedial provisions of the Act to similar provisions of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, with respect to brokers and dealers. *See* H.R. Rep. No. 2179, 86th Cong., 2d Sess. 4-5 (1960) and H.R. Rep. No. 123, 94th Cong., 1st Sess. 89 (1975).

* Pub. Law 86-750, 74 Stat. 885; Pub. Law 91-547, 84 Stat. 1431; and Pub. Law 94-29, 89 Stat. 167.

Statement of the Case

The court of appeals held that petitioners should be permanently enjoined from publishing information and opinion about the value of, or the advisability of investing in, securities because petitioners are not registered under the Investment Advisers Act of 1940 (the "Act").

Petitioners are publishers of investment newsletters. Lowe Management Corporation publishes the *Lowe Investment & Financial Letter* (hereinafter referred to as the "*Lowe Letter*") and the *Lowe Stock Advisory* (JA7).* Lowe Stock Chart Service, Inc. has announced its intention to publish, but has not yet published, the *Lowe Stock Chart Service* (JA32-33). Christopher L. Lowe is the President of Lowe Management Corporation and Lowe Stock Chart Service, Inc. and is the Research Chairman and Editor of the three publications (JA7).**

Petitioners' only activity is publishing. Petitioners are not alleged to be engaged in selling or buying, or offering to sell or buy, securities or other investments and are not alleged to have any interest in any of the securities or other investments that they describe or comment on (JA5-26). Petitioners are not alleged to be rendering personal advice to individual investors (JA5-26).

The newsletters primarily contain news about investment markets and the movement of market indicators, and the forces affecting those markets. The newsletters also

* JA refers to the joint appendix.

** The corporate petitioners have no corporate parents or subsidiaries and have no corporate affiliates except each other.

contain factual information and the publishers' opinion about the value and desirability of specific publicly traded securities and other forms of investment.

An example of petitioners' newsletters is the eight-page issue of the *Lowe Letter* dated December 11, 1981 (JA 78). It contains a one-page news article reporting on market conditions and stating the market outlook. That is followed by nearly two pages of reports and evaluations on the movement of 29 market indicators. After that appear nearly three pages of news and evaluations of trading patterns of 21 groups of stocks and specific evaluations (both favorable and unfavorable) of stocks within some of these groups. Lastly, the newsletter contains two pages of news and evaluation of gold, silver and shares of gold mining companies.

The newsletters are distributed by mail to subscribers. (JA32). The *Lowe Letter* has approximately 5,000 subscribers and the *Lowe Stock Advisory* has approximately 600 subscribers (JA31-32). Distribution of the two newsletters, prior to the trial, was irregular: two issues of the *Lowe Letter* were published in 1981 and five were published in 1982, and four issues of the *Lowe Stock Advisory* were published in 1981 (JA32).

Prior to May 1981, Lowe Management Corporation had been a registered investment adviser and had been engaged in rendering personal investment advice in addition to publishing investment newsletters (JA8). On May 11, 1981, respondent Securities and Exchange Commission (the "Commission"), acting under sections 203(e) and 203(f) of the Act, 15 U.S.C. § 80b-3(e) and § 80b-3(f), revoked

Lowe Management Corporation's registration as an investment adviser and ordered that Christopher Lowe be barred from association with any investment adviser (JA64). The Commission based its action on its finding that Christopher Lowe had been convicted in 1977 and 1978 of two felony and two misdemeanor counts,* and upon its determination that such action woud be "in the public interest." *Id.*

After the Commission's order, petitioners continued only their publishing activity and on June 6, 1982, the Commission filed a complaint against them in the United States District Court for the Eastern District of New York (JA5-32). The complaint sought to enjoin petitioners from continuing to publish their newsletters and to require them to disgorge all monies or proceeds received in connection with their publishing business since the date of the Commission's order (JA23-26).

The complaint asserted that petitioners were publishing their newsletters in violation of section 203(a) of the Act, 15 U.S.C. § 80b-3(a), and the Commission's order because they were not registered under the Act as investment advisers (JA18-23). The complaint did not assert that any of the information reported or opinions expressed in petitioners' publications was fraudulent or misleading or that

* In 1977, Lowe had been convicted in New York on two misdemeanor counts for violations of N.Y. Gen. Bus. Law §§ 352-c and 359-eee, for misappropriation of funds and failure to register as an investment adviser (JA9). In 1978, he had been convicted in New York on two felony counts for tampering with physical evidence and grand larceny in the third degree (JA10). Subsequently, in 1982, Lowe was convicted in New Jersey on two counts of theft by deception in the third degree (JA74-77). None of these convictions arose out of petitioners' publishing activities and none was related to the information or opinions expressed in the newsletters.

petitioners owned, or profited through ownership of, securities referred to in the newsletters.*

After a trial before Chief Judge Jack B. Weinstein on September 13, 1982, the district court dismissed the portions of the complaint seeking to enjoin petitioners' publishing activities and seeking disgorgement. The district court held that the petitioners' newsletters constituted pure First Amendment speech and noted the heavy presumption against the constitutional validity of a system of prior restraints. 556 F. Supp. at 1367. The district court further held that even if the publications were assumed to be "commercial speech," the sanction of future prohibition against publishing the newsletters was excessive and would be invalid under the First Amendment. 556 F. Supp. at 1366. Rather than adopt an interpretation that might collide with the guarantees of the First Amendment, the district court construed the Act so as to delete, except in very limited circumstances, the Commission's discretion to deny or revoke registration of publishers and other persons rendering impersonal investment advice. 556 F. Supp. at 1368-69.

A divided court of appeals reversed in a 2-1 decision rendered January 18, 1984 and held that petitioners should be prohibited from "selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." 725 F.2d at 902. The

* Two additional counts in the complaint asserted that petitioners' failure to disclose Christopher Lowe's convictions and the Commission's order to their readers violated the antifraud sections of section 206(a)(1) and 206(a)(2) of the Act, 15 U.S.C. §§ 80b-6(a)(1) and (2) (JA19-22). These counts were dismissed by the district court. 556 F. Supp. at 1370-71. They were not discussed by the court of appeals and are not at issue in this Court.

majority opinion found that petitioners' publications were the kind of commercial activity whose regulation is permitted by the First Amendment and it analogized the Act's licensing requirements, as applied to publishers, to the licensing of professionals. 725 F.2d at 900-01. Alternatively, it found that petitioners' publications were "potentially deceptive commercial speech" and therefore subject to regulation. *Id.* The majority opinion said, however, that Christopher Lowe would not be prohibited "from publishing recommendations in somebody else's bona fide newspaper as an employee, editor or writer." 725 F.2d at 902.

The dissenting judge would have affirmed the district court's judgment. 725 F.2d at 910. The dissenting opinion said that publications such as the petitioners' enjoy full First Amendment protection at least so far as prior restraint is concerned and that they do not constitute commercial speech. 725 F.2d at 906. It referred to the heavy presumption against the constitutional validity of prior restraints and said that "the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." 725 F.2d at 907-08.

Summary of Argument

As applied to publishers, the registration requirements of the Act violate the most fundamental of First Amendment principles by imposing a prior restraint in the form of a discretionary licensing system. Any system of prior restraint bears a heavy presumption against its constitutional validity, and licensing of the press is one of the most objectionable systems of prior restraint.

The Act's licensing standards, which are based on prior misconduct of the publisher and broad discretion of the Commission, fail to assure that constitutionally protected material is not suppressed. Prior misconduct of a publisher is not a proper standard for denial of the right to publish, because there is no necessary connection between prior misconduct and the contents of a future publication. In this case, notwithstanding petitioner Christopher Lowe's prior criminal convictions, the investment information and opinion published in his newsletters were not found, or even alleged to be, fraudulent or misleading.

Moreover, the Commission has impermissibly broad discretion to deny or revoke a publisher's license. After finding past misconduct, the Commission need only find that denial or revocation is "in the public interest." Such a standard is not sufficiently objective or definite under the First Amendment to assure that constitutionally protected materials will remain protected. And no constitutionally required procedural safeguards are provided. The Act does not require any judicial determination, or even any administrative determination, that the material being suppressed is constitutionally unprotected.

Information and opinion about securities or other products available to the public, when published by a disinterested publisher, are fully protected by the First Amendment. Such information and opinion serve an important societal function; but even if they did not, the government may not prohibit public discussion about any subject of legitimate public interest. Segregating investment information and opinion as a subject on which people may not publish unless they obtain a license from the Commission

violates the First Amendment's requirement of content neutrality.

Publication by the press of investment information is pure First Amendment speech, not "commercial activity" that would allow the government to license publishers. The power to regulate commercial activity generally has never given the government a right to subject the press to discretionary licensing. Calling petitioners' newsletters "commercial activity" entirely ignores that they are publications. Publishing is not a subordinate component of petitioners' activity; it is the only activity in which they are engaged.

Petitioners' publications are not "commercial speech." They are not "expression related solely to the economic interests of the speaker and its audience." Petitioners have no direct or indirect economic interest in the securities they discuss or in whether the reader buys, sells or does nothing. Petitioners' expression relates to the economic interests not of themselves and their readers, but to the economic interests of their readers and third parties buying and selling securities and of the public in general.

Nor are petitioners' publications "speech which does no more than propose a commercial transaction." Petitioners do not propose securities transactions. They only publish information and opinion (favorable and unfavorable) on securities that may be proposed for purchase or sale *by others*. And even if petitioners' publications were classified as commercial speech, petitioners' publications have not been shown to be deceptive or even likely to be deceptive. *Complete suppression* of petitioners' disinterested publishing of investment information is far more extensive than necessary to further any legitimate state interest.

Finally, the Act unconditionally discriminates against newsletter publishers by excluding from the definition of investment adviser, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Under the Act, a newspaper is free to publish news and opinions about stocks. If Christopher Lowe publishes the *identical* news and opinion, he must obtain a license, failing which he can be *imprisoned* merely for the act of unlicensed publishing. Freedom of the press, however, applies equally to all publishers and it is intolerable under the First Amendment, and the due process clause of the Fifth Amendment, for Congress to discriminate against one segment of the press.

ARGUMENT

I.

The Registration Requirements of the Act, and the Injunction Mandated by the Court of Appeals, are Unconstitutional Prior Restraints on Freedom of the Press and Freedom of Speech.

As applied to publishers, the registration requirements of the Act violate the most fundamental of First Amendment principles by imposing a prior restraint in the form of a discretionary licensing system. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976).

Although prior restraints are not unconstitutional *per se*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971).

Licensing of the press, where the right to publish depends on obtaining permission from the licensor, is one of the most objectionable systems of prior restraint.

> "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

Members of the City Council v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2124 n. 13 (1984) (quoting *Lovell* v. *Griffin*, 303 U.S. 444, 451-52 (1938) (footnote omitted)). *See also Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931).

The Court has been particularly concerned to assure that prior restraints of First Amendment activity, and especially licensing, even where permitted, do not result in the suppression of constitutionally protected speech. "Where government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling interest." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980). If the restriction involves licensing, in order to assure that protected First Amendment activity is not suppressed, the licensor must have narrow, objective and definite standards, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969), and the licensing statute must provide strong procedural safeguards, *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*.

The Act's licensing standards are not precisely drawn or appropriately limited, because they fail to assure that constitutionally protected speech is not suppressed. The Act provides for licensing based on the past acts of the publisher and the discretion of the Commission, not on whether the publication itself is or is not protected. Assuming, *arguendo*, that prevention of fraud might be a compelling state interest justifying licensing, *but see Village of Schaumberg* v. *Citizen for a Better Environment*, 444 U.S. 620, 637 (1980), and *Schneider* v. *State*, 308 U.S. 147, 164 (1939), under the Act publication of investment information and opinion may be totally suppressed without regard to whether it *is* truthful or fraudulent. The Act authorizes the Commission to deny or revoke a registration not upon a determination that particular material is constitutionally unprotected, but merely upon a finding of specified prior misconduct of the publisher and a discretionary determination by the Commission that revocation or denial would be "in the public interest." *See* section 203(e), 15 U.S.C. § 80b-3(e).

Prior misconduct is not a proper standard for the denial of freedom of speech, even where the misconduct involves

prior abuse of that right. *Near* v. *Minnesota, supra* (invalidating injunction against future publishing of defamatory material notwithstanding prior publication of defamatory material); *Gayety Theatres, Inc.* v. *Miami,* 719 F.2d 1550 (11th Cir. 1983) (voiding theatre licensing); *Entertainment Concepts, Inc.* v. *Maciejewski,* 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981) (voiding motion picture licensing); *Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980) (voiding theatre licensing); *Perrine* v. *Municipal Court,* 5 Cal. 3d 656, 488 P.2d 648 (1971), *cert. denied,* 404 U.S. 1038 (1972) (voiding bookstore licensing).*

Prior misconduct is an improper standard because there is no necessary connection between prior misconduct and the contents of a future publication. Christopher Lowe, for example, was convicted of serious crimes including third degree grand larceny, but there is no suggestion that any of the investment information or opinion published in his newsletters is or has ever been fraudulent or misleading. The Act is particularly offensive in that the range of specified prior misconduct is very broad, including such crimes as burglary, arson, larceny and mail fraud relating back for a period of ten years preceding the application. *See* section 203(e), 15 U.S.C. § 80b-3(e).

If the government fears that a publisher will abuse his First Amendment rights, it can monitor that person's activity and, if wrongdoing is committed, may punish such wrongdoing. What it cannot do consistently with the

* Twenty-two additional federal and state cases invalidating, and four cases upholding, licensing schemes based on past misconduct are cited in *Cornflower,* 485 F. Supp. at 785-86.

heavy presumption against prior restraint is prohibit the future exercise of those rights based on past violations. If the Commission, based on Christopher Lowe's past misconduct, fears that he may commit fraud using his publications, it may read the publications and if it believes a fraud has been committed, may seek to punish him for that fraud. But it has no constitutional authority to prohibit future publication in the mere anticipation that a fraud may be committed.*

The right to publish despite past misconduct is a corollary of the principle that the First Amendment bars the government from selecting who may and who may not speak. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 790-91 (1978) (quoting *Buckley* v. *Valeo,* 424 U.S. 1 at 48-49 (1976)). The Commission may not determine that Lowe or any other particular person is not fit to engage in publishing. Under the First Amendment everyone is fit to publish. *Bellotti.*

The Act also leaves an impermissible degree of discretion in the Commission to deny or revoke a publisher's license. After a finding of specified misconduct, the Commission has full discretion limited only by a requirement that it find its own action to be in "the public interest," a standard that presumably guides every public official. Such a standard is not sufficiently objective or definite under the First Amendment to assure that constitutionally

* The Commission made no finding as to the likelihood that petitioners will commit fraud through the use of their publications.

protected materials will remain protected. *See, e.g., Shuttlesworth* v. *City of Birmingham, supra* (licensing system for parade permits held to be unconstitutionally broad where based on standard of whether the public welfare, peace, safety, health, decency, good order, morals or convenience requires that the permit be refused).

As stated in *Shuttlesworth*,

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *City of Baxley*, 355 U.S. 313, 322.

394 U.S. at 151. *See also Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 97 (1972).

The Act also fails to provide constitutionally required procedural safeguards. In *Southeastern Promotions, Ltd.* v. *Conrad, supra*, the Court stressed that to avoid constitutional invalidity, a system of prior restraint must not only fit within one of the narrowly defined exceptions to the prohibition against prior restraints, it must also have been accomplished with necessary procedural safeguards against suppressing constitutionally protected speech. *Id.* at 559.

> We held in *Freedman* [*Freedman* v. *Maryland*, 380 U.S. 51 (1961)], and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of

> instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560.

The Act, however, does not require any showing that the *material* is unprotected. It merely requires a showing that the publisher of the material has engaged in prior misconduct. And the Act does not require the Commission to institute judicial proceedings. The restraint imposed by its discretionary denial of the license is permanent and no final judicial determination is necessary.

Finally, even if the Act were a proper narrowly drafted licensing statute, the courts below could still not enjoin petitioners' unlicensed publication in advance. *See Near* v. *Minnesota, supra; New York Times Co.* v. *United States, supra.* As stated in *Southeastern Promotions*,

> The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

420 U.S. at 558-59.

II.

Licensing and Enjoining Petitioners' Publications Are Not Valid Subject Matter Regulations.

A. The Information and Opinions Petitioners Publish About Securities Are Fully Protected Against Prior Restraint by the First Amendment.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. *Alabama,* 310 U.S. 88, 102 (1940).

In a complex economic society, information and opinion about products available to the public, including financial products such as securities, are necessary and appropriate to enable the members of society to cope with the exigencies of their period.

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensible. See *Dun & Bradstreet, Inc.*

> *v. Grove,* 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of certiorari). See also, *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring). And if it is indispensible to the proper allocation of resources in a free enterprise system, it is also indispensible to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia Pharmacy Board v. *Virginia Citizens Council,* 425 U.S. 748, 765 (1976) (footnotes omitted).* *See also Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561-62 (1980).

Even apart from this Court's recognition, in the context of commercial speech cases, of the societal importance of commercial information, petitioners have a right to publish their views on the value of securities as much as on any other subject. Constitutional protection does not turn upon the social utility of the ideas and beliefs which are offered. *NAACP* v. *Button,* 371 U.S. 415, 444-45 (1963). The Court has repeatedly emphasized that government may not prohibit discussion about any subject of legitimate public interest. *E.g., Police Department of Chicago* v. *Mosley*:

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* The Court also stressed that:

> As to the particular consumer's interaction in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in today's most urgent political debate.
>
> * * *
>
> Generalizing, society may also have a strong interest in the free flow of commercial information.

Id. at 562.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . . To permit the continued building of our politics and culture, and to ensure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.

408 U.S. at 95-96.

The First Amendment does not protect speech only to the extent it can be characterized as political and the rights of free speech and free press are not confined to any field of human interest. *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217, 223 (1967); *Thomas* v. *Collins,* 323 U.S. 516, 531 (1945). As stated in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978): "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak. . . ."

As Chief Justice Hughes said in *Near* v. *Minnesota, supra,* at 713-14 (quoting Blackstone, 4 COMMENTARIES 151-52):

> *Every free man has an undoubted right to lay what sentiments he pleases before the public;* to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

(Emphasis added).

Congress may not single out a particular topic of legitimate public interest to be subject to licensing. "The First Amendment's hostility to content based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic."

Carey v. *Brown,* 447 U.S. 455, 462 (1980) (quoting *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530, 537 (1980)). In *Carey* v. *Brown* and *Police Department of Chicago* v. *Mosley,* the Court invalidated anti-picketing ordinances that exempted the subject of labor disputes. In *Consolidated Edison,* the court invalidated a regulation that barred utilities from publishing opinion on the subject of nuclear power. Content neutrality prohibits the government from discriminating on the basis of the content of the message. *Regan* v. *Time, Inc.,* 104 S. Ct. 3262, 3267 (1984).

The Act unconstitutionally violates content neutrality by segregating investment information and opinion as a subject on which people may not publish unless they are exempt or obtain a license. The legislature has no power to declare such a subject, which is a matter of legitimate public interest, to be off-limits to publishers.

Judge Brieant's view was therefore correct when he stated, in dissent below:

> We address here not the power to regulate, or punish fraud after publication, but the power to impose prior restraint. Investment opinion, in my opinion, is as much speech protected from prior restraint as is political opinion, philosophy or gibberish.

725 F.2d at 907.

B. Petitioners' Publishing Is Not "Commercial Activity" Subject to Licensing.

The registration requirements of the Act as applied to petitioners and other publishers are not, as the court of appeals held, "the kind of regulation of commercial activity permissible under the First Amendment." 725 F.2d at 900.

The power to regulate commercial activity generally has never given the government a right to subject the press to discretionary licensing. Publications do not lose their First Amendment protection against prior restraint by being characterized as something else. *See Near* v. *Minnesota,* 283 U.S. at 720: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." Similarly, characterizing a newsletter as "commercial activity," and *thereby entirely ignoring that it is a publication,* does not allow the government to require the publisher to obtain a license to publish.

Nothing in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 150 (1967) or *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 456 (1978), on which the court of appeals principally relied, 725 F.2d at 899-901, implies a governmental power to license the press. The plurality opinion in *Curtis Publishing* noted, as the court of appeals said, that the press is not immune from general business regulation. But *Curtis Publishing* also stressed that the founding fathers "firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion,' " and that while protected activity may in some respect be subject to sanctions, it is not open to all forms of regulation. 388 U.S. at 149-50 (citation omitted). The Court said:

> Our touchstones are that acceptable limitations must neither affect "the impartial distribution of news" and ideas, nor because of their history or impact constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

388 U.S. at 150-51 (citations omitted). Discretionary licensing of the press under the guise of licensing "commercial activity" plainly falls outside those limitations.

The excerpt from *Ohralik* relied on by the court of appeals only acknowledges government's power to regulate communications about commercial transactions by the participants in those transactions where speech is a "subordinate component" of their activity. *See Ohralik* at 457.

In *Ohralik,* the Court referred to:

> [n]umerous examples . . . of communication that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

436 U.S. at 456, *quoted at* 725 F.2d at 899.

Petitioners do not dispute the power of government to regulate insider trading, corporate communications with shareholders about a proposed merger, information exchanges among manufacturers, and threats by employers to their employees during labor disputes. But that power in no way limits the right of the press, free of prior restraint, to write about such events or their effect on the value of the securities of the companies involved. That a Texas Gulf Sulphur Company officer must disclose inside informa-

tion before trading doesn't mean that a disinterested publisher needs a federal license to write about Texas Gulf Sulphur Company or the worth of its shares.

Petitioners' publishing is not a "subordinate component" of petitioners' activity. It is the *only* activity in which they are engaged.

Nor can licensing of investment publishers be justified by comparing it, as the court of appeals did, to the licensing of professionals. *See* 725 F.2d at 901. The difference between the publisher and the licensable professional is that the publisher publishes impersonal advice available to the world at large, and thereby contributes directly to public discussion. In contrast, the licensable professional renders personal, and private, advice to individual clients for their particular needs.

The difference between the publisher and the licensable professional is exemplified by *New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967), *reversing* 28 A.D.2d 161, 283 N.Y.S.2d 984 (1st Dept.). There the court refused to enjoin publication of the book *How to Avoid Probate!* and rejected the contention that the author and his publishers and book sellers were engaged in the unauthorized practice of law. Even though some of Dacey's readers might rely on his published advice, Dacey was not involved in the "representation and advising of a particular person in a particular situation," 28 A.D.2d at 174, 283 N.Y.S.2d at 998 (dissent), but was rather engaged in the exercise of First Amendment rights.*

* *Compare Grievance Committee* v. *Dacey*, 154 Conn. 129, 222 A.2d 339 (1966), *app. denied*, 386 U.S. 683 (1967), where Dacey was enjoined in Connecticut not as to publishing his book, but as to tailoring instruments and rendering personal advice relating to the particular needs of particular customers.

Similarly, in light of First Amendment considerations, courts have refused to enjoin non-lawyers from publishing "divorce kits" containing forms and impersonal legal advice. *In re William Thompson*, 574 S.W.2d 365 (Mo. 1978); *Florida Bar* v. *Brumbaugh*, 355 So.2d 1186 (Fla. 1978), *overruling Florida Bar* v. *Stupica*, 300 So.2d 683 (Fla. 1974); *Oregon State Bar* v. *Gilchrest*, 272 Or. 552, 538 P.2d 913 (1975); *see also State Bar of Michigan* v. *Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976); *but see Palmer* v. *Unauthorized Practice Committee*, 438 S.W.2d 374 (Tex. Civ. App. 1969).

Lawyers, doctors and personal investment advisers who give personal advice to individual clients may be licensed as professionals and their licenses may be revoked for misconduct. But publishers, such as petitioners, who only publish information and opinion, may not be deprived of their First Amendment rights through a system of discretionary licensing.

C. Petitioners' Publications Are Not "Commercial Speech."

Petitioners' publications are not commercial speech. Commercial speech requires that the speaker have an economic interest in the transaction he proposes. Petitioners have no such interest in the sale or purchase of the securities that their newsletters discuss.

The Court has described "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. 557, 561 (1980) (citing *Virginia Pharmacy Board* v. *Virginia Citizens Consumer*

Council, 425 U.S. 748, 762 (1976), *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 363-64 (1977), and *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979)).

The Court has also said that:

> our decisions have recognized "the 'common sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978); see *Bates* v. *State Bar of Arizona, supra*, at 381; see also Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 38-39 (1979).

Central Hudson Gas, 447 U.S. at 562 (footnote omitted).

More recently, in *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2880 (1983), the Court referred to "the core notion of commercial speech—'speech which does "no more than propose a commercial transaction,"'" (citing *Virginia Pharmacy Board*, 425 U.S. at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). In *Bolger* the Court held that commercial speech included a manufacturer's promotional material in the form of informational pamphlets. The Court relied on the combination of the following factors: the pamphlets were conceded to be advertisements, they referred to a specific product, and the manufacturer had an economic motivation in disseminating them. 103 S. Ct. at 2880.

Justice O'Connor subsequently described "commercial speech" as "speech intended and used to promote a commercial transaction with the speaker." *Roberts* v. *United States Jaycees*, 104 S. Ct. 3244, 3258 (1984) (O'Connor, J., concurring).

The speech that fits the Court's definitions is commercial advertising, a term which as used here includes related promotional material. Commercial advertising is characterized by the speaker's economic interest in the commercial transaction that his speech promotes. Commercial advertising, in which the speaker has such an economic interest, is the type of speech that relates solely to the economic interests of the speaker and his audience and that proposes a commercial transaction. It is also the type of speech intended and used to promote a commercial transaction with the speaker.

Cases in which the Court has identified commercial speech have dealt exclusively with commercial advertising and in each case the speaker had an economic interest in the commercial transaction that his speech promoted. *See, e.g., Virginia Pharmacy Board, supra* (advertising by pharmacists); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (advertising by seller of residential property); *Bates, supra* (advertising by lawyers; *Ohralik* v. *Ohio State Bar Association, supra* (advertising by lawyers); *Friedman, supra* (use of trade names by optometrists); *Central Hudson Gas, supra* (promotional advertising by utility company); *Matter of R-M-J*, 455 U.S. 191 (1982) (advertising by lawyers); and *Bolger, supra* (promotional advertising by manufacturer of prophylactics).

The court of appeals misconstrued *Bates* and *Friedman*, in deciding that "[the Court's] definitions do not limit

commercial speech to advertising," 725 F.2d at 900.* *Bates* indicated, as the court of appeals said, that commercial speech "'must be distinguished by its content,'" 433 U.S. at 363 (quoting *Virginia Pharmacy Board*, 425 U.S. at 761). But the "content" in *Bates* was commercial advertising by lawyers and in *Virginia Pharmacy Board* it was advertising by pharmacists. In *Friedman*, the Court said, as the court of appeals indicated, that "by definition, commercial speech is linked inextricably with commercial activity." 440 U.S. at 10 n. 9. But the definition of commercial speech actually used in *Friedman*, as elsewhere, is "speech that does no more than propose a commercial transaction." *Id.* (quoting *Pittsburgh Press Co.*, 413 U.S. at 385). Neither *Bates* nor *Friedman* suggested any expansion of commercial speech beyond commercial advertising to include a newsletter whose publisher has no economic interest in the transaction about which he writes.

The Court has noted two features of commercial speech that permit its regulation. The commercial speaker has extensive knowledge of his product and as a consequence of his economic self-interest in the proposed transaction, his speech is a hardy form of expression. *Central Hudson Gas*, 447 U.S. at 564 n. 6; *Bates*, 433 U.S. at 381; *Virginia Pharmacy Board*, 425 U.S. at 771-72 n. 24. Both features

* The Second Circuit's view conflicts with that of the Third and Fourth Circuits and, apparently, the Fifth Circuit. *See Ad World, Inc.* v. *Doylestown*, 672 F.2d 1136, 1140 (3rd Cir.), *cert. denied*, 456 U.S. 575 (1982) ("[t]he Supreme Court has confined the category of 'commercial speech' to cases involving 'purely commercial advertising'"), *Davenport* v. *City of Alexandria*, 710 F.2d 148, 150 n. 6 (4th Cir. 1983) (*en banc*) ("'commercial speech' is a legal term of art referring to advertising . . . .") and *Turner Advertising Co.* v. *National Service Corp.*, No. 83-3588, —— F.2d —— (5th Cir., slip opinion, September 27, 1984).

indicate that commercial speech is limited to commercial advertising by speakers economically interested in the transaction being proposed.

In *Central Hudson Gas*, the Court said:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

447 U.S. at 564 n. 6.*

By contrast, commentators in the press, evaluating a product offered by others, do not have the same knowledge

* In *Virginia Pharmacy Board*, the Court said,

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

425 U.S. at 771-72 n. 24.

In *Bates*, the Court said,

> Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *id.* [*Virginia Pharmacy Board*, 425 U.S.], at 771-772 n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.*

433 U.S. at 381.

as the manufacturer or seller of the product and certainly do not have his degree of economic self-interest in talking about the product.

Commercial speech has also been explained in terms of the state's legitimate interest in regulating the terms of sale of commercial products and services. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372, 386-89 (1979). The "informational function" of the sellers' speech is protected by the First Amendment. *See Central Hudson Gas*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising"). But the seller's statements about his products or services also have a "contractual function" in that they form part of the transaction between the seller and the buyer. To be able to regulate that transaction, for example to prevent fraud, deception or overreaching by the seller, the state must be able to regulate what the seller says. It is therefore the "contractual function" of the seller's speech that allows regulation. As noted by Farber:

> Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language. So long as a regulation relates to the contractual function of the utterance, the regulation should not be subject to the intensive scrutiny required when a regulation

> directly implicates the first amendment function of language.

Id. at 387 (footnote omitted). The government interest disappears however when the utterance is made by a third person with no relation to the transaction. *Id.* at 388-89.

Disinterested speech *about* commercial products by the press is not commercial speech. As stated by Jackson and Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 at 1 (1979):

> 'Commercial speech' refers to business advertising that does no more than solicit a commercial transaction or state information relevant thereto. Both content and context are critical to this classification. Editorial advertising is not commercial speech, and neither is a discussion of goods or services in a news account or consumer guide.

(footnote omitted).*

Because petitioners have no economic interest in the commercial transactions they discuss, petitioners' publications are not "commercial speech." Petitioners' disinterested comments about the advisability of buying, *e.g.*, IBM

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* To the same effect is Note, *Constitutional Protection of Commercial Speech*, 82 Colum. L. Rev. 720 at 720 (1982):

> The initial problem presented in dealing with commercial speech is that of definition. Two ingredients must at a minimum be present. The first is one of content: the speech must tend to promote the purchasing of goods or services. The second is one of motivation; the purpose of the speech must be the advancement of the financial interests of the speaker via that transaction.
>
> Economic motivation alone can never be sufficient to classify speech as commercial. . . . Similarly, commercial content alone is insufficient—Consumer Reports is not in the same category for First Amendment purposes, as product advertising. Hence it is the combination of the two elements that is the key.

stock or Chrysler stock are no different from *Consumer Reports'* comments about the advisability of buying IBM computers or *Motor Trend*'s comments about the advisability of buying Chrysler cars. Like others who only write about, but have no interest in, commercial products, petitioners publish opinions that are not "expression related solely to the economic interests of the speaker and its audience." Petitioners do not sell investments; they report and comment on the investments offered by others. Their expression relates to the economic interests not of themselves, but of their readers and third persons in the market with whom their readers may buy and sell securities, and of the public in general. Petitioners are not economically affected by whether their subscribers buy or sell particular investments or do nothing.

Similarly, petitioners' publications are not "speech proposing a commercial transaction." Petitioners do not propose commercial transactions; they comment on the advisability of transactions proposed by others.

Petitioners' speech does not have the distinguishing features of commercial speech that permit regulation. Since petitioners only comment on investments offered and sold by others, they are "outsiders," and lack the "extensive knowledge" possessed by the issuers and sellers of these investments.

Petitioners' form of expression also lacks the "hardiness" of commercial advertising. Petitioners are writers selling only their own writings and do not have the "economic self-interest" of the issuers, underwriters or shareholders promoting the sale of securities owned or held by such persons.

Finally, since petitioners are not selling securities, their speech has no "contractual function." Their speech has only an "informational function," and is therefore pure First Amendment speech.

D. Even if Petitioners' Publications Contain Commercial Speech, a Permanent Injunction Is Excessive.

The Court has set forth a four-part analysis for commercial speech cases:

> For commercial speech to come within that provision [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas, 447 U.S. at 566; *Accord, Bolger*, 103 S. Ct. at 2881.

Under a commercial speech analysis, the remedy of outright prohibition of all future speech is almost always more extensive than necessary to serve the Government's interest. *See, e.g., Virginia Pharmacy Board, Linmark Associates, Bates, Ohralik, Central Hudson Gas, R-M-J* and *Bolger, supra.* In *Central Hudson Gas*, the Court stated: "Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n. 9. Even when an advertiser has previously published

deceptive advertising, a total ban on future advertising would be unconstitutional where corrective disclosures can be provided. *See, e.g., National Commission on Egg Nutrition* v. *FTC,* 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978) (FTC may not constitutionally prohibit a trade association's dissemination of statements as to the absence of risk of heart attack from eating eggs; additional disclosure required).

In *Bolger,* the Court held that the statute that prohibited the mailing of unsolicited advertisements for contraceptives was invalid, because it was more extensive than the government's asserted interest in protecting minors permitted and because "it denies to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area." 103 S. Ct. at 2884 (footnote omitted). Similarly, even under a commercial speech analysis, a *total ban* on Lowe's future publishing of investment information would deny the public *truthful information* bearing on its ability to discuss and make informed decisions in connection with lawful economic matters and is more extensive than necessary to protect any relevant government interest. Given the disclosure mechanisms and post-publication civil and criminal penalties available to remedy wrongdoing, the censorship that the Commission would impose on petitioners is more extensive than necessary to effectuate any proper government objective.

III.

The Act Unconstitutionally Discriminates Against Newsletter Publishers.

The Act unconstitutionally discriminates against petitioners and other investment newsletter publishers in favor of the publishers of newspapers, news magazines and business and financial publications of general and regular circulation.

Section 202(a)(11)(D) of the Act, 15 U.S.C. § 80b-2(a)(11)(D), excludes from the definition of investment adviser, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." The court of appeals, saying it was applying the test of *SEC* v. *Wall Street Transcript,* 422 F.2d 1371 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970), held that this exclusion was not available to appellants because they were not engaged primarily in "customary newspaper activities" but rather were engaged in the activities that the Act is intended to regulate.* 725 F.2d at 898.

The exclusion has also been explained by the Commission in a release that states, "[t]his exception is applicable only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice."

* *Wall Street Transcript* had held that the applicability of the exemption does not depend on objective factors but that "[w]hat matters is whether or not a specific publication is engaged in practices which the Act was intended to regulate, such as the offering of professional investment advice without revealing the possibility of personal gain to the publisher from what he reports or how he presents it." *Id.* at 1378. The *Wall Street Transcript* test appears to be circular, in that the activities the Act was intended to regulate depends on whom the Act was intended to cover.

Applicability of Investment Advisors Act to Certain Publications, SEC Rel. No. IA-563, 42 Fed. Reg. 2953 n. 1 (1977) (codified at 17 C.F.R. § 276).* The Commission's test was recently applied in *SEC* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984).

Whether under the *Wall Street Transcript* test or the Commission's test, if a newsletter publisher publishes analyses of stocks, he is required to register. But if the *Wall Street Journal* or *Barron's* publishes the identical analyses, their publisher is not required to register. Similarly, under the court of appeals holding, Christopher Lowe may not publish investment opinion in his own newsletters, but he is free to publish the same opinion if he is employed by a general circulation newspaper.** 725 F.2d at 902. If he works for a newspaper, he can freely write, e.g., "IBM is a good stock." But if he publishes that statement in his newsletters, he can be imprisoned.

The Act's discrimination against newsletters violates the elementary rule that the freedom of the press applies to all publishers.

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Branzburg v. *Hayes,* 408 U.S. 665, 704 (1972) (quoting *Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938)). The traditional doctrine is that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph *just as much* as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg,* 408 U.S. at 704 (emphasis added).

The First Amendment does not permit the favoring of one segment of the press over another. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .'" *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 790-91 (quoting *Buckley* v. *Valeo,* 424 U.S. 1 at 48-49 (1976)). As noted by Chief Justice Burger:

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell* v. *Griffin, supra,* 303 U.S. at 451-452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fevor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinion supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary

* In addition to including investment newsletters, the Commission's release includes within the definition of "investment adviser" publishers of books on investments where the books appear either in a series or are intended to be supplemented or updated. *See* SEC Rel. No. 1A-563, *supra.* On the other hand, the statutory definition also appears to exclude persons who for compensation disseminate investment opinion through non-print media.

** The Commission's staff takes the position that a person who writes an investment column for an exempt publication as an independent contractor, and not as an employee, is not exempt. *See Bernard Feuer,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,954 (1978).

> view: [quoting from *Branzburg*, at 408 U.S. at 704-05] . . . .

435 U.S. at 801 (Burger, C.J., concurring) (footnote omitted). *See also Smith* v. *Daily Mail Publishers Co.*, 443 U.S. 97 (1979) (holding unconstitutional a statute restricting newspapers from printing the names of those charged in juvenile proceedings but not restricting the electronic media or any other form of publication).

The Court recently invalidated under the First Amendment the Minnesota ink and paper use tax, not only because the tax singled out the press, but also because it targeted a small group of newspapers. *Minnesota Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1375-76 (1983). "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action[,]" *id.* at 1376, a burden that Minnesota failed to satisfy.

The distinction between regulated and excluded publications also violates the First Amendment ban on discrimination based on a publication's content. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3267 (1984) (citing *Carey* v. *Brown*, 447 U.S. 455, 463 (1980) and *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972)).

The distinction between regulated publications and excluded publications appears to turn partly on the content of the messages in the publication. If the publication includes sufficient non-investor-oriented material, it may become exempt. Review of content is therefore necessary. SEC Release No. IA-563, *supra*, expressly acknowledges the need to review content, among other factors, to determine whether the exclusion applies. Courts have also found it necessary to examine content, among other factors, to determine the applicability of the exclusion. Compare *SEC* v. *Suter*, *supra* (Suter's newsletters are not excluded) and *SEC* v. *Wall Street Publishing Institute*, [Current Volume] Fed. Sec. L. Rep. (CCH) ¶ 91,575 (D.D.C. July 12, 1984), *motion for stay pending appeal granted*, *id.*, ¶ 91,635 (D.C. Cir. August 10, 1984) (*Stock Market Magazine* is not excluded) with *SEC* v. *Wall Street Transcript*, 454 F. Supp. 559 (S.D.N.Y. 1978) (*Wall Street Transcript* is excluded).*

Under the court of appeals holding, a content-based examination of petitioners' future publications is necessary to determine whether any such publication will be regulated. Judge Brieant, dissenting below, asked:

> Suppose following remand, Lowe should transfer stock ownership of his corporations to a friend and add to his newsletters a tidetable, a list of ship arrivals, Ann Landers, a crossword puzzle and selections reprinted from *Areopagitica*? Would his newsletters now be *bona fide* newspapers, in the eyes of the majority?

725 F.2d at 908. To answer this question necessitates a detailed review and an evaluation of the publication's content, in violation of the constitutional ban on content-based discrimination.

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* The Commission's staff reviews content to determine the applicability of the exclusion in response to requests for "no-action" letters. *See, e.g., Media General Financial Daily*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,961 (1971) (*Media General Financial Daily* is not excluded) and *Finance Magazine*, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,536 (1971) (*Finance Magazine* is excluded).

The Act's discriminatory treatment of newsletters also violates the principles of equal protection incorporated in the due process clause of the Fifth Amendment. Under those principles, a statutory classification that significantly interferes with the exercise of a fundamental right cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *Zablocki* v. *Redhail*, 434 U.S. 374, 388 (1978). "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justification offered for any distinctions it draws must be carefully scrutinized." *Carey* v. *Brown*, 447 U.S. at 461-62 (citations omitted).

The Commission cannot under the First Amendment justify the Act's discrimination against newsletters nor under the Fifth Amendment can it show that such discrimination is closely tailored to effectuate a sufficiently important government interest. The danger of potential securities fraud is not a sufficient interest to justify any discretionary licensing of the press. *See* Point I, *supra*. But even if, *arguendo*, it were sufficient, that danger exists as much in the case of an exempt national newspaper or news magazine which chooses to publish investment information, as it is for a small newsletter publishing the same information. Newspapers and news magazines are not inherently immunized against the practice of securities fraud.* And by virtue of

* *See Senate Report on the Securities Exchange Act of 1934*, S. Rep. No. 792, 73d Cong., 2d Sess. 8 (1934): "In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a free-lance trader, without obligation except to publicize the stocks of the trader," quoted by Judge Weinstein at 556 F. Supp. at 1363. *See also Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979), where a financial writer employed by the Los Angeles Herald-Examiner violated the Commission's Rule 10b-5 by failing to disclose material facts in his newspaper column.

the enormous circulation of some exempt newspapers and news magazines, these publications and their employees have the capability of inflicting far greater damage on the investing public than any 5000-subscriber newsletter ever could.

The legislative history of the 1940 Act contains little justification for the distinction between newsletter publishers and exempt publishers. Congress was concerned with "unscrupulous tipsters and touts," H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940), but it did not examine the extent to which newspapers and others were also engaged in the same types of practices it was seeking to control. The only relevant discussion in the legislative history of the Act is a clear warning, which the draftsman evidently chose to disregard, in a memorandum prepared by the Research Division of the Illinois Legislative Counsel, that under *Lovell* v. *Griffin*, *supra*, all publications were protected by the First Amendment and Congress could not require licensing of a portion of the press. *Hearings on Investment Trusts and Investment Companies*, S. 3580, *Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. 1004, 1008-09 (1940).

In light of the equality of treatment constitutionally mandated for all parts of the press and in the absence of any clear and compelling justification for singling out newsletter publishers, the Act's discriminatory treatment of newsletters violates both the First and Fifth Amendment rights of petitioners.

Conclusion

The Court Should Invalidate Section 203(e) of the Act as it Applies to Publishers and Should Reverse the Judgment Below.

The Court should invalidate section 203(e) of the Act as it applies to publishers because the section imposes an unconstitutional prior restraint. The Court should not attempt to rewrite the Act, as Judge Weinstein did, to eliminate the Commission's licensing discretion over impersonal investment advisers. As pointed out by the court of appeals, 725 F.2d at 896, the legislative history provides no basis for such distinguishing between impersonal and personal advisers. Moreover, where a licensing law has been found to license unconstitutionally the rights of free speech or free press, the Court in the past has had no hesitancy in striking down the law.

Alternatively, the Court should invalidate section 203(e) as it applies to regulated publishers because it unconstitutionally discriminates against them and favors other segments of the press. This discrimination may not be eliminated merely by voiding the exclusion, since nothing in the legislative history suggests that Congress intended to subject the publications described in the exclusion to any type of registration.

Whatever determination is made with respect to section 203(e) as applied to publishers, the judgment of the court

of appeals imposes an unconstitutional prior restraint on petitioners' right to publish and should be reversed.

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Respectfully submitted,

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